No. 79-1380

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MICHAEL RODAK, .

IN THE

Supreme Court of the United States

October Term, 1980

PATRICIA R. HARRIS, Secretary of Health and Human Services,

Appellant,

v.

CHARLES EDWARD WILSON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE NEW YORK, PENNSYLVANIA, AND CALIFORNIA ASSOCIATIONS OF PRIVATE PSYCHIATRIC HOSPITALS AS *AMICI CURIAE*

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In accordance with this Court's Rule 36, the New York, Pennsylvania and California Associations of Private Psychiatric Hospitals have received the written consent of counsel for both parties to file this brief as *amici curiae*. Copies of the consents have been filed with the Clerk.

INTEREST OF *AMICI CURIAE*

The Associations consist of 54 of the 185 member secular and religious not-for-profit and investor-owned hospitals of the National Association of Private Psychiatric Hospitals. The

National Association was established in 1933. Its members annually provide more than 23,000 beds to treat 148,000 inpatients of all socioeconomic classes. Each member hospital is accredited by the Joint Commission on Accreditation of Hospitals, a prerequisite for participation as a provider in the Medicare and Medicaid programs (Titles XVIII and XIX of the Social Security Act). The Association is in the forefront of the diagnosis, treatment and research into mental illness, and has trained thousands of the nation's physicians, including some of the most prominent clinicians in American psychiatry. Private psychiatric hospitals have been significant providers of psychiatric services since the eighteenth century and continue that tradition as major participants in the Medicare and Medicaid programs. They are uniquely qualified to advise the Court respecting the full scope of its decision in this case and the impact it will have on the status and treatment of the mentally ill. The Associations, as members of the "psychiatric community," have long been aware of the attitudes that have stigmatized the mentally ill, in general, and the indigent mentally ill, in particular.

PARTY SUPPORTED

Amici curiae support the Appellees and pray that the Court affirm the decision of the District Court. *Sterling v. Harris,* 478 F.Supp. 1046 (N.D.Ill. 1979), *prob. juris. noted sub nom. Harris v. Wilson,* 100 S. Ct. 2938 (1980).

BACKGROUND

The Supplemental Security Income Program

The Supplemental Security Income Program consists of two components: one for persons who are institutionalized (the "inpatient" benefit in issue here) and one for those who are not. The program was enacted to provide financial assistance to the

aged, blind, and disabled poor.[1] The scheme of the program, which is outlined in Figure A, is to provide income maintenance depending upon need. Persons who are indigent and blind, aged, or disabled, and who are not institutionalized, qualify for full income maintenance. This is shown in the "Full Coverage" column of Figure A. Persons who are indigent and blind, aged, or disabled, and who are in institutions where bed and board are provided, do not require the full income maintenance payments, and therefore receive smaller payments of up to $25 per month for small comfort items. This is the inpatient benefit and is shown in the "Reduced Coverage" column of Figure A.

Persons who are not indigent, or who are not blind, aged, or disabled, do not qualify for SSI coverage under either component. However, they are not the only ones who do not qualify: certain indigent persons, whose particular disability is mental illness, are excluded from SSI participation under the inpatient component. §1611(e)(1) of the Social Security Act, 42 U.S.C. § 1382(c)(1) (1976). This is illustrated in the last entry of the "No Coverage" column of Figure A. It results from the exception and re-inclusion provisions of §1611(e) which incorporate the Medicaid eligibility criteria into the SSI program by reference. It is this anomaly which gives rise to the present litigation.

The Mental Health Anomaly

Although the Act's purpose extends to "every aged, blind, or disabled individual who is determined under part A to be eligible on the basis of his income and resources . . .",[2] an

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[1] Pub. L. No. 92-603, Title III, §§301, 302, 86 Stat. 1329, 1465, 42 U.S.C. §§1381a, 1382, (1972) amending Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.* The term "disabled" includes the mentally ill. Section 1614 of the Social Security Act, 42 U.S.C. 1382c(3)(1976).

[2] Section 1602 of the Social Security Act, 42 U.S.C. § 1381a (1976).

exception from eligibility is made of any person who throughout a month is an "inmate of a public institution."[3] This is a misleading provision because, in fact, no inmate of a public medical institution is excluded from SSI benefits simply because he is such an "inmate."[4] The program coverage which is taken away by Section 1611(e)(1)(A) of the Act is partially restored to some by Section 1611(e)(1)(B)[5] which provides a monthly allowance for small personal comfort items for inpatients. This reduced-payment provision provides that an individual who throughout a month is in a hospital, extended care facility, nursing home, or intermediate care facility (public or private) receiving payments with respect to such individual under a State plan approved under Title XIX (Medicaid) may receive up to $25 per month. Thus, although "inmates" of public institutions are excluded from full SSI benefits, they nonetheless receive the same partial benefits which residents of private institutions receive if they are in institutions which are receiving medical assistance payments on their behalf under the Medicaid program. The "inmates" who fail to fall within the reincluded category are the tubercular and the mentally ill.

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[3] Section 1611(e)(1)(A) of the Social Security Act, 42 U.S.C. §1382 (e)(1)(A). Section 1611(e)(1)(C) was added to the Social Security Act by Pub. L. No. 94-566, Title V, §505(a), 42 U.S.C. § 1382(e)(1)(C), 90 Stat. 2667, 2686, (1976) to provide that the §1611(e)(1)(A) exclusion of inmates of public institutions does not apply to a publicly operated community residence which serves no more than 16 residents.

[4] The "except as provided" language of §1611(e)(1)(A) makes it clear that inmates of all public institutions, *per se*, are not excluded, only those not covered by §1611(e)(1) (B) and (C).

[5] 42 U.S.C. §1382(e)(1)(B)(1976). This provision applies to *any* resident of an institution, not just residents of public institutions.

Figure A
SSI PROGRAM COVERAGE

FULL COVERAGE if:	REDUCED COVERAGE if:	NO COVERAGE if:
Indigent[1]	Indigent[1]	Not indigent[1]
and	**and**	**or**
Aged, blind or disabled[1]	Aged, blind or disabled[1]	Not aged, blind or disabled[1]
and	**and**	
Not in public institution with Medicaid coverage[2]	In public institution with Medicaid coverage[3]	
and	**or**	
Not in private institution with Medicaid coverage[2]	In private institution with Medicaid coverage[4]	
		or
		In public institution with no Medicaid coverage[3]
or		
In private institution with no Medicaid coverage[5]		

[1] §1611(a)(1) and (2).

[2] §1611(b); "medicaid coverage" refers to payments received on behalf of the individual concerned.

[3] §1611e(1)(A) and (B).

[4] §1611(e)(1)(B).

[5] §1611(b), (e)(1)(B). This loophole has little practical effect. *See infra* n. 13.

The Medicaid Exclusion

Congress established the Medicaid program in 1965 by amending the Social Security Act to provide a new Title XIX, "Grants to States for Medical Assistance Programs".[6] Coverage

[6] Pub. L. No. 89-97, §121(a), 42 U.S.C. §1396 *et seq.*, 79 Stat. 286 (1965).

under Medicaid was limited by defining the term "medical assistance" conjunctively to mean (1) payment of the cost of certain services, as (2) provided to certain needy persons.[7] In pertinent part, the "persons" included were those under the age of 21, those 65 years of age or older, and permanently and totally disabled persons of 18 years of age or older.[8] "Services" were defined to mean most medical services, including:

> "(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);
>
> * * * * *
>
> (4) skilled nursing home services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older;
>
> * * * * *
>
> (14) inpatient hospital services and skilled nursing home services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases; and
>
> (15) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;

except that such term ["medical assistance"] does not include—

> (A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

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[7] Pub. L. No. 89-97, §121(a), 79 Stat. 286, establishing §1905 of the Social Security Act (currently found at 42 U.S.C. §1396d(a), as subsequently amended).

[8] *Id.*

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases."[9]

Subsequently, Congress amended §1905(a) of the Social Security Act to add inpatient psychiatric hospital services involving active treatment of persons under age 21 to the list of covered services.[10]

By definition, persons who are patients in an institution for mental diseases or who are receiving inpatient psychiatric hospital services are persons with a mental disease, that is, they are mentally ill.[11] Thus, the effect of these provisions is to deny Medicaid coverage for inpatient mental hospital services to all mentally ill persons between the ages of 21 and 65, and mentally ill persons under age 21 who are not undergoing active treatment, if they are patients in an institution for mental illness.[12]

SUMMARY OF ARGUMENT

The court below correctly held that the exclusion of Supplemental Security Income benefits to mentally ill individuals under §1611(e)(1) constitutes a classification based on mental illness. But for their status as mentally ill persons,

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[9] *Id.* The provisions of §1905(a)(15)(A) and (B) of the Social Security Act as originally passed are now found at §1905(a)(17)(A) and (B), 42 U.S.C. §§1396d(a)(17)(A) and (B) (1976 & Supp. II 1978).

[10] Pub. L. No. 92-603, §299(B), 88 Stat. 1329 (1972), §1905(a)(16), 42 U.S.C. §1396d(a)(16).

[11] *See, e.g.*, 42 C.F.R. §435.1009 (1979), definition of "[i]nstitution for mental diseases."

[12] The exclusion of Medicaid coverage is not limited to public mental institutions, but applies to all mental institutions, private as well as public, serving the excluded age groups.

Appellee class members would be entitled to payments of up to twenty-five dollars ($25) per month under the Supplemental Security Income program, Title XVI of the Social Security Act. The exclusion of Appellees from benefits is based on their status as mentally ill. The constitutional right of equal protection requires that statutory classifications based on mental illness be subjected to heightened judicial scrutiny. A heightened degree of judicial scrutiny is proper when a statute groups people together under a classification considered sensitive for purposes of equal protection analysis.

The court below applied the factors this Court has considered in determining when to engage in heightened judicial scrutiny and concluded that a classification based upon mental illness required closer scrutiny. The court below was correct in its conclusion and should be affirmed. The stigma of mental illness is manifest in our legal institutions and in interpersonal and societal relationships. It is still widely misunderstood in our society, and therefore subject to inaccurate generalizations and stereotyping. Because mental illness has been misunderstood and feared, persons labeled mentally ill have thereby obtained a peculiarly disfavored status, a badge of "opprobrium." Persons labeled mentally ill by our society do not choose to be subjected to the disabilities of that status, and cannot voluntarily choose to escape that status. Having created the disfavored status of mental illness, our society, its institutions and its laws, then impose disabilities on persons bearing that status.

Although the precise question what level of scrutiny should be given to a classification based upon mental illness has not yet been addressed by this Court, its prior decisions demonstrate that heightened judicial scrutiny is required. The mentally ill are a group "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection . . . ." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28 (1973). Equal protection requires heightened judicial scrutiny of a classification which

applies long-standing and outmoded stereotypes and stigmatizes members of a group, affects a "discrete and insular minority" unable effectively to make its voice heard in the political process, and relates to a characteristic over which individuals have little or no control. A classification based upon mental illness is such a classification. This Court has recognized the need for special judicial protection of the mentally ill by providing them with particular procedural protections against deprivations of their rights. These supplementary procedural protections show that this Court recognizes that our society is inclined to deprive invidiously the mentally ill of their rights. This tendency requires that a classification based on mental illness needs heightened judicial scrutiny in the equal protection area.

The district court correctly held that, under heightened scrutiny, the statutory provision here in question must fall as not substantially related to the achievement of any important governmental objective. Congress' intent in establishing the Supplemental Security Income inpatient component, which provides partial benefits to those in public and private medical institutions, was to provide small sums to the needy aged, blind, and disabled to enable them to purchase small comfort items not supplied by the institution, items such as personal toilet articles, reading materials, and items of clothing. Although the Appellant suggests that conservation of public funds is a basis for excluding small payments to the mentally ill in institutions, such a motive cannot survive heightened judicial scrutiny. Extension of benefits to the excluded mentally ill would cost a miniscule fraction of total expenditures of the Social Security Act programs. There is no substantial relationship between this exclusion and the general provision of the small social welfare benefit that is the aim of this part of the SSI program. There is, moreover, no interest in federal-state comity served by the exclusion, and certainly no substantial interest served. The exclusion must fall.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE SUPPLEMENTAL SECURITY INCOME STATUTE WHICH DENIES INPATIENT BENEFITS TO PERSONS IN MENTAL INSTITUTIONS EMPLOYS A CLASSIFICATION BASED ON MENTAL ILLNESS

As Appellant acknowledges (Appellant's Brief at 18-19), "[t]he question whether mental health classifications must be viewed under [a] stricter standard is an important one that may some day require resolution by the Court." *Amici* respectfully submit that the day has come: the intended purpose and effect of the Supplemental Security Income (SSI) Program's incorporation (Social Security Act §1611(e)(1)(B), 42 U.S.C. §1382(e)(1)(B) (1976)) of Medicaid qualification criteria (Social Security Act §1905(a), as amended, 42 U.S.C. §1396d(a)(1976 & Supp. II 1978)) is categorically to exclude mentally ill persons from SSI inpatient benefits because of their mental illness.[13]

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[13] Appellant attempts (Appellant's Brief at 16 n. 10, 20) to make much of the fact that, on the face of the statute, persons excluded from Medicaid coverage who are patients in private institutions are not disqualified from full benefits, as opposed to partial SSI inpatient benefits. Appellant's reliance on this point is misplaced. The Congressional interest in enacting the SSI scheme was to provide significant assistance to the non-institutionalized indigent, to provide partial assistance in the form of a monthly allowance for personal comfort items to those indigents who were institutionalized, and to provide nothing to those who were not indigent. Congress did not intend to provide full SSI benefits to the privately institutionalized mentally ill. While certain inpatients may be entitled to full SSI benefits on the face of the statute (see last entry in the first column of Figure A, *supra*), this constitutes an unintended loophole. Moreover, few individuals actually can qualify for full SSI benefits under the

(*footnote continues*)

What Appellees are contesting in this case is their exclusion from the partial SSI inpatient benefit payments which they would be receiving but for their status as mentally ill persons. They are not contesting their exclusion from full SSI benefits by virtue of their residence in an institution (public or private). (*See* Figure A, last entry in "No Coverage" column.) The Appellant has advanced the argument that Appellees are excluded, not because they are mentally ill but, rather, because they are in mental institutions. Appellant's Brief at 20. This distinction without a difference does not alter the fact: the statute is aimed at the mentally ill and it has hit the mark.[14]

(*footnote continued*)

loophole: as a practical matter, few if any persons who can afford private hospitalization without Medicaid assistance would nevertheless qualify as indigents for the purposes of SSI coverage. The only real example that comes to mind is an indigent who has a rich benefactor willing to pay for private hospitalization but who is at the same time unwilling to provide additional monies for the upkeep of the indigent beneficiary. The apparent loophole classification 'indigent persons not qualifying for Medicaid and resident in private institutions' is, for all practical purposes, an empty set. In any event, Appellees are not contesting their exclusion from full benefits for the non-institutionalized. Rather, they are contesting their exclusion from the inpatient benefit for those who are institutionalized.

[14] Thus, Appellant's reliance (Appellant's Brief at 22) on *Harris v. McRae,* 100 S. Ct. 2671 (1980), is misplaced: *Harris v. McRae* is authority for the proposition that Congress may, absent an invidious classification, choose to fund some but not all medical services under a medical assistance program. However, the classification in issue here is used not to regulate the receipt of medical services, but in the context of a federal income maintenance program. So used, this classification is not only invidious, but was selected because of its impact and not in spite of it. *See also General Electric Co. v. Gilbert,* 429 U.S. 125 (1976) (employer may exclude pregnancy benefits from an employee disability plan consistently with Title VII of the Civil Rights Act.).

The Medicaid program excludes coverage to a group of eligible mentally ill persons that would otherwise be covered were they not mentally ill. That group consists of those persons in an institution for mental illness under the age of 21 not undergoing active treatment and those between the ages of 21 and 65. The effect of this statute is clear: a large group of mentally ill persons, otherwise eligible, is excluded from coverage. When Congress incorporated the Medicaid coverage criteria into the SSI eligibility formula, it did not specifically express its intent in the legislative history. Congress was surely aware, however, when it enacted the SSI statute and incorporated into it Medicaid coverage requirements, that those requirements included a severe limitation on payments to the mentally ill. In the same bill which enacted the SSI program in 1972 as Title XVI of the Social Security Act, Congress also amended the Medicaid program, Title XIX of the Act. Included in these amendments was extension of Medicaid coverage to inpatients in psychiatric hospitals under the age of 21 undergoing active treatment.[15] Also under consideration was a provision in the Senate bill authorizing demonstration projects to determine whether coverage under Medicaid should be extended to persons between the ages of 21 and 65 in mental hospitals.[16] Congress was clearly cognizant that payments to the mentally ill under Medicaid were considerably limited, in that it had before it—and rejected—proposals to extend that very coverage.[17] The effect of the incorporation of the Medicaid coverage criteria into the SSI program is again clear: a large group of mentally ill persons otherwise eligible is excluded from coverage.

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[15] Social Security Amendments of 1972, Pub. L. No. 92-603, §299(B), 86 Stat. 1329, §1905(a)(16) of the Social Security Act, 42 U.S.C. §1396d(a)(16) (1972).

[16] H.R. Rep. No. 1605, 92d Cong., 2d Sess. (conference report) *reprinted in* [1972] U.S. Code Cong. & Ad. News 5370, 5398.

[17] The Appellant adopts this position. *See* Appellant's Brief at 34.

This classification has the effect of denying benefits to otherwise eligible individuals because they are mentally ill. The SSI legislative scheme, by incorporating the Medicaid eligibility criteria, as surely excludes mentally ill persons—and as precisely—as if the Congress had legislated a provision which recited that no person otherwise eligible for SSI inpatient benefits may receive them if he is mentally ill and between the ages of 21 and 65. Surely this Court would consider that a classification based on race were at issue if a statute stated that no blacks between the ages of 21 and 65 would obtain the benefit. The situation is no different in this compound classification. Notwithstanding additional qualifications, a classification based on mental illness is still at issue and is the effective category excluding the persons involved. *See e.g., Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). In *Weber*, the Court considered the provision in the Louisiana workman's compensation laws that denied an equal right of recovery to unacknowledged illegitimate children, as opposed to both legitimate and acknowledged illegitimate children. The Court considered that the classification at issue was one based on illegitimacy. *See id.* at 172. The lower court had considered significant the fact that not all illegitimates were barred from recovery, but only some. This Court rejected that approach. *Id.* 168-69. So, too, in the instant case, the fact that some statutory qualifications permit certain mentally ill persons (those being treated in general hospitals) to obtain the SSI inpatient benefit does not negate the basic classification before this Court. A classification based upon mental illness is clearly at issue. The juxtaposition of legitimate classifications with invidious classifications does not justify the latter. The court below held (478 F. Supp. 1046, 1049) that the Appellees were denied reduced SSI payments because of a classification based on mental illness. That conclusion should be upheld.

II.

THE CONSTITUTIONAL RIGHT OF EQUAL PROTECTION REQUIRES THAT A STATUTORY CLASSIFICATION BASED ON MENTAL ILLNESS BE SUBJECTED TO HEIGHTENED JUDICIAL SCRUTINY

When a statutory classification restricts benefits to or burdens a group entitled to special judicial protection or burdens certain fundamental rights, the constitutional right to equal protection of the laws requires that a statutory classification bear more than merely a rational relationship to a colorably legitimate governmental interest. This Court has recognized that heightened scrutiny of certain classifications is appropriate. A racial classification is generally subject to strict scrutiny, *e.g., compare Loving v. Virginia,* 388 U.S. 1 (1967) *with Regents of the University of California v. Bakke,* 438 U.S. 265, 356 (1978) (opinion of Brennan, White, Marshall and Blackmun, JJ).[18] A classification based upon alienage usually requires strict scrutiny, *compare Graham v. Richardson,* 403 U.S. 365 (1971) *and Sugarman v. Dougall,* 413 U.S. 634 (1973) *with Foley v. Connelie,* 435 U.S. 291 (1978) ("reasonable basis" test applies to exclusion of aliens from democratic political institutions). A heightened degree of judicial scrutiny is proper when a statute groups people together under a classification considered sensitive for purposes of equal protection. *See, e.g., Craig v. Boren* 429 U.S. 190 (1976) (gender); *Trimble v. Gordon,* 430 U.S. 762 (1977) (illegitimacy).

The court below applied the factors this Court has considered in determining when to engage in heightened judicial scrutiny and concluded that a classification based upon mental illness requires such scrutiny. The court below was correct in its conclusion and should be affirmed. The stigma of mental illness is manifest in our legal institutions and in interpersonal

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[18] These Justices considered that a racial classification meeting certain articulated tests, while requiring heightened judicial scrutiny, ought not to be subject to the most demanding standard.

and societal relationships. Mental illness is still widely misunderstood in our society, and therefore subject to inaccurate generalizations and stereotyping. Because mental illness has been so misunderstood and feared, persons labeled mentally ill have thereby obtained a peculiarly disfavored status, a badge of "opprobrium."[19] Persons labeled mentally ill by our society do not choose to be subjected to the disabilities of that status, and cannot voluntarily choose to escape that status. Having created the disfavored status of the mentally ill, our society, its institutions and its laws, then impose disabilities on persons bearing that status.[20]

This Court has concluded that a group "saddled with such disabilities or subject to such a history of purposeful unequal treatment" is entitled to a heightened degree of judicial scrutiny of classifications affecting their rights, *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28 (1973). In so doing, the Court has shown that when society applies long-standing and outmoded stereotypes and stigmatizes members of a group, that group classification requires heightened judicial scrutiny.

The question of what level of scrutiny should be given to a classification based upon mental illness has not yet been directly addressed by this Court.[21] In his concurring opinion in

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[19] *See generally Developments in the Law—Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190, 1200 (1974).

[20] *Id.* at 1193-201.

[21] This Court's summary affirmance of *Legion v. Richardson,* 354 F. Supp. 456 (S.D.N.Y.), at 414 U.S. 1058 (1973) *sub nom. Legion v. Weinberger* is not authority to the contrary. *Legion,* which considered the viability of the Medicare and Medicaid exclusions, parts of programs designed for medical assistance, is no authority for this Court considering the SSI program under Title XVI of the Social Security Act, a social welfare program with a completely different thrust. At issue in *Legion* was the limited coverage for psychiatric services provided by Medicare (Title XVIII of the Social Security

(*footnote continues*)

O'Connor v. Donaldson, 422 U.S. 563, 583 (1975), the Chief Justice considered what due process would require of a program for the protection of the mentally ill:

> At a minimum, a particular scheme for protection of the mentally ill must rest upon a legislative determination that it is compatible with the best interests of the affected class and that its members are unable to act for themselves. Moreover, the use of alternative forms of protection may be motivated by different considerations, and the justifications for one may not be invoked to rationalize another. (citations omitted)

In the instance of a program specially directed towards the mentally ill, the Chief Justice would require a legislative determination of the propriety of the system applied and of each element involved. This requirement that the legislature focus carefully upon each element of its program for the mentally ill and that the courts accept only an articulated

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(*footnote continued*)

Act) and the exclusion from coverage provided by Medicaid (Title XIX) of individuals under age 65 in institutions for mental diseases. The lower court considered that the statutes classified on the basis of those requiring long-term care and those requiring short-term care. It applied the "rational basis" test to this classification, and upheld the statute, alluding to "the belief by Congress that care of the mentally ill in state hospitals was the responsibility of the states." 354 F. Supp. at 459. Dealing with both the Medicare and Medicaid programs, *Legion* considered that the putative classifications at issue concerned blacks or poor persons, and did not address the question whether a classification based on mental illness was at issue.

Nor is contrary authority found in *Kantrowitz v. Weinberger,* 388 F. Supp. 1127 (D.D.C. 1974), *aff'd,* 530 F.2d 1034 (D.C. Cir.), *cert. denied,* 429 U.S. 819 (1976) upholding the Medicaid exclusion, now encompassing those aged 21-65 years, on the basis of *Legion. Kantrowitz* scrutinized the exclusion on a theory that an age classification, and not a mental illness classification, was at issue.

rationale for each element is certainly a more careful degree of judicial scrutiny of a legislative program than that normally accorded under the "reasonable basis" test, with its great deference to the legislative will. The test that the Chief Justice requires for a legislative program regarding the mentally ill appears much closer to the degree of judicial oversight required under a heightened scrutiny for equal protection purposes: a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation", *Reed v. Reed,* 404 U.S. 71, 76 (1971) (*quoting Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)); a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Califano v. Webster,* 430 U.S. 313, 316-17 (1977) (*quoting Craig v. Boren,* 429 U.S. 190, 197 (1976)). If such legislation, the chief purpose of which is to deal with the mentally ill, requires this heightened scrutiny, then a classification based upon mental illness must constitutionally be given a closer judicial look than that accorded by the "reasonable basis" test.

This Court has in the past provided special procedural protections against deprivations of rights inflicted upon individuals because they are mentally ill. *O'Connor v. Donaldson,* 422 U.S. 563 (1975), held that a state cannot constitutionally confine the nondangerous mentally ill if they can survive in the community with the help of willing family and friends. *Addington v. Texas,* 441 U.S. 418 (1979), held that a "clear and convincing" standard of proof is required in civil commitment proceedings. *Vitek v. Jones,* 100 S. Ct. 1254, 1264 (1980), held that a prisoner cannot be involuntarily transferred to a mental hospital without minimum due process procedures, since classifying an individual as "mentally ill" and the "stigmatizing consequences of a transfer to a mental hospital," along with subjection to involuntary psychiatric treatment, constitute deprivation of constitutionally-protected liberty. If such supplementary procedural protections are required to protect an

individual in the process of classification as mentally ill then utilization of that classification should be considered enough for this Court to take a close look, for purposes of equal protection, at its usage in statutes.

A number of factors have been considered by this Court in determining whether a classification requires heightened scrutiny: 1) whether the group so classified is a discrete and insular minority and unable effectively to make its voice heard in the political process; 2) whether society subjects the group so classified to stigma and negative stereotypes and whether the classification serves to perpetuate a feeling of inferiority among the members of the group as to their status in the community; 3) whether the characteristic serving as the basis of the classification relates to the ability to perform or contribute to society; and 4) whether the characteristic is one over which the individual has no control. By these criteria, a classification based upon mental illness requires heightened scrutiny.

Political Weakness

When a group is politically impotent or unable to engage effectively in political give-and-take among interest groups, when it is a discrete and insular minority, this Court has considered heightened scrutiny appropriate for classifications affecting that group. *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *see United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).[22] The disabilities affecting the participation of the mentally ill in the political process are considerable.

As noted by the court below, patients in mental institutions may have only a limited right of association and have difficulty

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[22] However, the propriety of drawing equal protection doctrine from the "discrete and insular" concept first articulated in the *Carolene* footnote is not unquestioned. *See, e.g.*, the dissenting opinion of Mr. Justice Rehnquist in *Sugarman v. Dougall*, 413 U.S. 634, 650-63 (1973).

in engaging in political give-and-take.[23] Among the civil incapacities which various states have imposed upon individuals civilly committed to mental institutions are prohibitions against voting, serving in public office, serving on a jury, practicing a profession, and making a contract or will. *See Developments in the Law—Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190, 1198-99 (1974) and citations therein. The political impotence of the seriously mentally ill, founded upon their inability—actual or perceived—to function fully in society, is so extreme that the states have often exercised a specially intrusive power over them and reduced them to wardship. As the Chief Justice has pointed out, a state's exercise of this power substantially restrains personal freedom. *O'Connor v. Donaldson,* 422 U.S. at 563. This oft-exercised power to subordinate substantially and constrain the rights of the mentally ill, and even reduce the seriously ill to a wardship, indicates that the mentally ill constitute a minority sufficiently discrete and insular as to require special judicial concern for their protection.

Stigma, Stereotype, and Perpetuation of Feelings of Inferiority

In reviewing the classifications this Court has considered proper to evaluate under strict scrutiny—race, national origin, and alienage—it is clear that one concern of this Court has been those human characteristics which have been the subject of a "long history of prejudice," L. Tribe, *American Constitutional Law* 1060 (1978). That this has been an animating concern behind the "illegitmacy" cases, leading this Court to apply a heightened degree of scrutiny, is likewise clear. *See, e.g., Jimenez v. Weinberger,* 417 U.S. 628 (1974); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972). This Court's approach to equal protection analysis shows that groups which are traditionally disfavored because of unreflective and unanalytic lawmaking require the additional safeguard provided by heightened scrutiny. L. Tribe, *American Constitutional Law* 1090 (1978). As this Court has said, "Certain

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[23] 478 F. Supp. at 1052.

classifications . . . in themselves supply a reason to infer antipathy." *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 272 (1979). These classifications include those which "have traditionally been the touchstone for pervasive and often subtle discrimination." *Id.* at 273.[24]

This Court has recognized that the concept of "stigma" plays a role in equal protection analysis in another way. A classification may be utilized improperly to stigmatize a disfavored group in society. *See, e.g., Regents of the University of California v. Bakke,* 438 U.S. 265, 360-61 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

The mentally ill require protection under both senses of the term "stigma." The mentally ill have traditionally been a disfavored class, perceived as inferior to society as a whole. Moreover, just as a racial classification "has often been used to stigmatize politically powerless segments of society," *Fullilove v. Klutznick,* 100 S. Ct. 2758, 2796 (1980) (concurring opinion by Marshall, J.), we submit that the classification "mentally ill" has been utilized to stigmatize a politically impotent group, and to perpetuate a feeling that those so labeled are inferior.

This Court has recognized the social stigma of mental illness and the adverse consequences that attach to that status, *Vitek v. Jones,* 100 S. Ct. 1254, 1261, 1263-64 (1980); *Addington v. Texas,* 441 U.S. 418, 425-26 (1979). In *Parham v. J. R.,* 442 U.S. 584 (1979), it noted the public's "negative reaction" to "the symptomatology of mental or emotional illness." *Id.* at 601. It has recognized that the label "mentally ill" constitutes a stigma in our society. *See id.* 622 (concurring opinion by Stewart, J.); *id.* 626-27 (opinion by Brennan, J., concurring in part and dissenting in part).

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[24] *See e.g., Mathews v. Lucas,* 427 U.S. 495, 521 (1976) (dissenting opinion by Stevens, J.).

This Court has pointed out the even more pronounced adverse social reaction that is generated towards an individual committed to a mental hospital, an event which "can have a very significant impact on the individual." *Addington,* 441 U.S. at 426 (1979).

Ability to Perform or Contribute to Society

In *Frontiero v. Richardson,* 411 U.S. 677 (1973), this Court observed that classifications that are subject to heightened judicial scrutiny involve a characteristic that "frequently bears no relation to ability to perform or contribute to society." *Id.* at 686. "Mental illness" is such a classification. Neither a general classification of mental illness, nor, for that matter, a particular psychiatric diagnosis speaks directly to a specific individual's ability to perform a defined social function. Whether an individual can perform or contribute in a given instance depends on the particular nature and severity of the symptoms from which he or she is suffering. *See, e.g., Parham v. J.R.,* 442 U.S. 584, 601 (1979). Indeed, many patients are quite able to perform or contribute in a given instance since their symptoms are in remission or are controlled by therapeutic methods.[25] Thus, the misconception held by many, that an individual who is mentally ill cannot perform or contribute to society, is another example of the negative and lingering stereotyping historically burdening these affected individuals.

Involuntary Characteristic

In applying this Court's indicium of "an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973), the court below concluded correctly "...that the policy behind this indicium—to extend extra protection to persons that have been identified by a factor over which they have no control—is satisfied in the case of the mentally ill." 478 F. Supp. at 1052. Despite continuing

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[25] *See, e.g.,* Klerman, Affective Disorders, in *The Harvard Guide to Modern Psychiatry* 253, 258 (A. Nicholi, Jr., *ed.* 1978) (depression).

debate as to the nature and causes of mental illness,[26] there is medical consensus that for patients hospitalized with serious mental disorders "[r]ecovery from illness is, for the most part, beyond voluntary control."[27]

Moreover, with increasing evidence of genetic,[28] biochemical,[29] and organic[30] determinants of mental illness, much

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[26] For a partial explanation, see Kety, Genetic and Biochemical Aspects of Schizophrenia, in *The Harvard Guide to Modern Psychiatry* 93, 93 (A. Nicholi, Jr., *ed.* (1978):

> The modern science of genetics has revolutionized cell biology and contributed significantly to the understanding of a large number of medical diseases. It has only recently begun to have an impact on psychiatry. A large number of problems peculiar to psychiatry have contributed to this lag. Human behavior, which is the special concern of psychiatry, is *particularly sensitive to scientific scrutiny.* Because of its real or assumed theological, social, and political implications—about which there are powerful divisions and polarizations—the study of genetic factors in normal and abnormal human behavior is sometimes seen as a threat to deeply held convictions. (emphasis added)

[27] 1 J. Zusman & W. Carnahan, *Mental Health: New York Law and Practice* 11-9 (1976). The authors explain:

> To sum up the medical-pathological model, it assumes that something has gone wrong *inside* the patient's body; that the factors leading to this are beyond the control of the patient; that expert intervention is necessary to recognize and to prescribe treatment for the disorder; and that if the treatment is appropriate, the illness will be halted or cured. *Id.*

[28] *See, e.g.,* Kessler, *The Genetics of Schizophrenia: A Review,* in 6 Schizophrenia Bull., National Institute of Mental Health 404, 411 (1980) (U.S. Dep't. of Health and Human Services):

> Individual studies—family, twin, adoption—all contain methodological problems and flaws, and can be subjected to greater or lesser criticism. Nevertheless, the overwhelming direction of the findings of all these studies, carried out in different countries and at different times, is remarkably consistent in confirming that

(*footnote continues*)

psychopathology appears to be linked with "an immutable characteristic determined solely by the accident of birth."

(*footnote continued*)

genetic factors are involved in the etiology of schizophrenia. Also, these studies confirm that although in many cases a genetic predisposition to schizophrenia may be a necessary precondition, it is by no means a sufficient condition to produce the disorder. Both genes and environment play a substantial role in the etiology of schizophrenia.

See also Klerman & Barrett, Clinical and Epidemiological Aspects of Affective Disorders, in *Lithium—Its Role in Psychiatric Research and Treatment* 201, 211-13 (S. Gershon & B. Shopsin *eds.* 1973):

> There is virtually unanimous agreement among different [international] studies in reporting an increased frequency of manic-depressive illness in the relatives of diagnosed patients .... As one review author (Winokur *et al.*, 1969) states: "There are few stable and easily reproducible findings in the field of psychiatry. One of these is that the group of primary affective disorders are familial and may be traced through several generations in many families. All studies, even the most cursory, have found this to be so, and there are no negative investigations." ... Thus, there is good evidence for a genetic factor operating in depressive illness, and the genetic material would appear to have major relevance in contributing to a meaningful and valid diagnostic classification.

[29] *See* Kety, Genetic and Biochemical Aspects of Schizophrenia, in *The Harvard Guide to Modern Psychiatry* 93, 98 (A. Nicholi, Jr., *ed.* 1978): "If genetic factors play a significant role in the etiology of schizophrenia, then biochemical factors must do so as well, since the genes can only operate through biochemical mechanisms."

See also Schildkraut, The Biochemistry of Affective Disorders: A Brief Summary, in *The Harvard Guide to Modern Psychiatry* 81, 91 (A. Nicholi, Jr., *ed.* 1978):

> Following the advances in other areas of medical nosology, many investigators now envision the development of a psychiatric nosology based not only on the clinical phenomenology of

(*footnote continues*)

Frontiero v. Richardson, 411 U.S. at 686. Unfortunately, mental illness—like race, gender and illegitimacy—has been peculiarly prone to exclusionary legislative classifications and, therefore, such a classification is most in need of sensitive judicial scrutiny.[31]

It is thus clear that under the principles enunciated by this Court, a classification based upon mental illness requires heightened scrutiny under the doctrine of equal protection of the laws. This Court must thus consider whether the exclusion from SSI inpatient benefits at issue can withstand this closer scrutiny.

(*footnote continued*)

affective disorders but also on knowledge of the biochemical mechanisms underlying these phenomena. It now seems likely that the biochemical tests may become as routine in the diagnostic workup of patients with affective disorders as they are currently in the evaluation of patients with other types of metabolic disorders.

[30] *See* Seltzer & Frazier, Organic Mental Disorders, in *The Harvard Guide to Modern Psychiatry* 297, 297 (A. Nicholi, Jr., *ed.* 1978):

Organic mental disorders are very common. Although precise data are difficult to find, some authorities estimate that they account for one out of five first admissions to a mental hospital (NIMH, 1966) and also occur frequently in general hospitals (Reding and Daniels, 1964; Lipowski, 1967b). Over 50 percent of geriatric patients in mental hospitals have this diagnosis (Riley and Foner, 1968), and many elderly people in the community also suffer from some degree of organic mental impairment (Broe et al., 1976).

[31] *See generally* G. Allport, *The Nature of Prejudice* 178-83, 245-46 (1954). Allport observes that "... the name of *any* deviant carries with it *ipso facto* a negative value-judgment. Words like *insane, alcoholic, pervert* are presumably neutral designations of a human condition, but they are more: they are finger-pointings at deviance." *Id.* at 182-83.

III.

THE DISTRICT COURT CORRECTLY HELD THAT THE STATUTORY CLASSIFICATION IS NOT SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF IMPORTANT GOVERNMENTAL OBJECTIVES

The classification at work in this case, like others of the kind discussed above, should be subjected to a more than casual judicial review. "This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives [citation omitted]". *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 273 (1979). *See also Caban v. Mohammed,* 441 U.S. 380, 391 (1979).

A. The classification bears no substantial relation to the object of the legislation.

Congress' purpose in establishing the Supplemental Security Income Program was "to provide supplemental security income to ... [e]very aged, blind, or disabled individual who is determined under part A to be eligible on the basis of his income and resources. . . ."[32] For most indigent inpatients, Congress provided a lesser amount, stating that such persons do not need full benefits because most of their subsistence needs are provided for by their institution.[33] It was Congress' intent to provide small payments needed by these people to enable them

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[32] Social Security Act §§1601, 1602, Pub. L. No. 92-603, 42 U.S.C. §§1381, 1381a, 86 Stat. 1329 (1972).

[33] See H.R. Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. and Ad. News 4989, 5136. The *Amici* agree with Appellant (Appellant's Brief at 33) that the SSI exclusion of residents of non-Medicaid institutions was deliberate. However, deliberate arbitrariness and deliberate unreasonableness are no less oppressive and objectionable to the Constitution than if they are inadvertent.

to purchase small comfort items not supplied by the institution.[34] In practice, patients have used these payments to purchase such items as personal toilet articles, reading materials, articles of non-institutional clothing, and similar items which lend personal dignity otherwise wanting in the lives of many of the institutionalized poor. These payments are in no way related to the treatment which an individual receives and his disposition of them is discretionary, often, the only significant exercise of discretion available to such an individual. The costs of the program, a maximum of $25 per month for each individual, are relatively small and, when compared with the balance of the Social Security Program, pale into insignificance. Yet its benefits, in terms of human dignity, are substantial.

Appellant has suggested (Appellant's Brief at 27) that Congress denied SSI inpatient benefits to persons in mental institutions in order to avoid spending federal resources on behalf of individuals whose "care and treatment" are being fully provided for by State and local governments. This suggestion is patently false. Congress specifically recognized that institutions generally do not supply the "small comfort items" which the partial payments fund.[35] Congress did not intend that these payments be made "on behalf" of anyone; Medicaid payments are made for medical services to institutions "on behalf" of their patients,[36] but SSI payments are made for non-medical purposes directly to individuals.[37] SSI inpatient benefits are for personal comfort items and are not for care and treatment.[38]

Appellant's implication that fiscal conservation was a contributing purpose is without reasonable foundation. Appellant has estimated that affirmance of the district court's decision would result in additional expenditures to members of Ap-

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[34] *Id.*

[35] *Supra* note 33 at 25.

[36] 42 U.S.C. §1396 (1976 & Supp. II 1978).

[37] 42 U.S.C. §1381a (1976).

[38] *Supra* note 33 at 25.

pellees' class of $30 million, nationwide. (Appellant's Reply Memorandum at 3). This represents less than 1% of all SSI payments for which funds were requested of the Congress by the President for fiscal year 1981, and 1/70 of 1% of all planned expenditures for Social Security Act Programs.[39] In short, Congress did not intend to exclude the mentally ill from SSI inpatient benefits because it wanted to save money, or because it thought they received equivalent benefits from state or local governments. It excluded them simply because it determined to do so, and it employed the Medicaid eligibility formula to accomplish this purpose. That formula, however suitable for identifying the medical services Congress wished to support, is not substantially related to the provision of SSI income maintenance payments. As this Court has noted, there is a vast difference between a statute which refuses to subsidize a certain activity, program or service and one which provides a broad disqualification from receipt of public benefits.[40] The Medicaid eligibility criteria, when used for the purposes of the Medicaid program, arguably fall into the former permissible category; but when used for the purposes of the SSI program, they clearly fall into the latter impermissible one.

The personal comfort needs of the mentally ill and the physically ill do not differ in any significant way. If anything,

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[39] U.S. Department of Health and Human Services, *The Fiscal Year 1981 Budget,* For Release at 10:00 AM (EST), January 28, 1980. FY 81 expenditures requested for SSI payments were $4.2 billion; for all Social Security Act programs, $209 billion. *Id.* at 58, 2. In any event, the mere saving of welfare costs cannot justify an otherwise invidious classification. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969), *Graham v. Richardson,* 403 U.S. 365, 374-75 (1971).

[40] *Harris v. McRae,* 100 S. Ct. 2671, 2688 n.19 (1980) (abortion funding); *Dandridge v. Williams,* 397 U.S. 471 (1970) (upper limit on total amount paid to family under AFDC program does not violate equal protection clause). *See also General Electric Co. v. Gilbert,* 429 U.S. 125 (1976) (employer exclusion of pregnancy benefits for employer disability plan consistent with Title VII of Civil Rights Act).

many mentally ill individuals are likely to benefit to a much greater extent from the improvement in self-esteem which SSI inpatient benefits payments can sometimes afford. These needs of the mentally ill are not now and were not in 1972 satisfied by state and local governments to the same extent as the SSI program makes possible for others. Depriving mentally ill persons specially of this benefit does not rest upon any ground of difference fairly or substantially related to providing the indigent ill some small amount of money for discretionary purposes. They have been denied equal protection on the basis of a classification which is an archaic and overbroad generalization.

B. The classification does not serve an important governmental interest.

That this classification does not achieve an important governmental objective of saving money has already been argued.[41] However, Appellant also advances the proposition that the exclusion of the institutionalized mentally ill from the SSI program serves some interest of federalism by leaving their treatment to the states. (Appellant's Brief at 29-31.) This proposition is without merit. The federal government involves itself in the treatment of mentally ill inpatients when they are 65 or over, under 21, and when their treatment is provided in a non-psychiatric institution.[42] It involves itself in the treatment of the mentally ill for all manner of outpatient services.[43] In fact, the only significant category of services with which the government does not involve itself relates to persons aged 21-65 in institutions for the mentally ill, known in a darker age as insane asylums. The individuals who are denied benefits are no

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[41] *Supra*, at 26-27.

[42] 42 U.S.C. §1396d(a) (14), (16), and (17)(B)(1976 & Supp. II).

[43] 42 U.S.C. §1396d(a) (2), (3), (4)(B), (5), (6), (7), (8), (9), (12), (13), and 17(B) (1976 & Supp. II 1978).

different from others whose care is financed in whole or in part by the federal government; nor are the benefits denied different from those financed in other types of public and private institutions. Thus, it is clear that the treatment of the mentally ill has not been left to the states, but has been a significant area of federal involvement. More importantly, the SSI inpatient benefits here in question have nothing to do with the treatment of the mentally ill, as they are provided for purposes other than treatment.

In short, by this classification no interest of federal-state comity is preserved, no intrusion upon state sovereignty is avoided, and no usurpation of state responsibility is prevented. This classification barely serves any governmental interest, much less achieves an important governmental objective. In its effect, it is an insane asylum exclusion, pure if not simple, having no proper place in an enlightened society.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment and opinion of the court below.

Respectfully submitted,

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